EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

1986 TERM

No. 85-5939

EULOGIO CRUZ,

Petitioner,

-against-

NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

EULOGIO CRUZ,

Petitioner,

-against-

NEW YORK,

Respondent.

The petitioner Eulogio Cruz respectfully prays that a writ of certiorari issue to review the order and opinion of the New York State Court of Appeals entered on October 17, 1985.

OPINIONS BELOW

The opinion of the New York Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Supreme Court of the State of New York, Appellate Division, First Department. The opinion of the Supreme Court of the State of New York, Bronx County (Eggert, J.), reported at 119 Misc. 2d 1080, 465 N.Y.S.2d 419 (1983), appears in the Appendix hereto.

JURISDICTION

The order of the New York Court of Appeals was entered on October 17, 1985, and this petition for certiorari was filed within 60 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the introduction at a defendant's trial of his nontestifying co-defendant's videotaped confession, which factually interlocks with the defendant's own alleged oral confession to a citizen informant, but which was far more reliable, violates the Confrontation Clause.

2. Whether two confessions with so greatly different levels of certainty that they were actually uttered can be considered "interlocking."

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments VI and XIV.

STATEMENT OF THE CASE

Petitioner Eulogio Cruz was indicted with his brother, Benjamin, in New York Supreme Court, Bronx County, for felony murder (N.Y. Penal Law §125.25[3])[1] and related offenses in connection with the killing of a

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1 New York Penal Law §125.25 (subd. 3) states in pertinent part:

A person is guilty of murder in the second degree when:

* * *

> 3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants. . . . [Emphasis supplied].

gas station attendant during a robbery on November 29, 1981.

There were no eyewitnesses to the robbery. The only direct incriminating evidence against either defendant at their joint trial were petitioner's and Benjamin's alleged oral confessions to one Norberto Cruz (no relation to petitioner) the morning after the robbery, and Benjamin's videotaped confession to the prosecutor five months later.

According to the evidence presented by the People at trial, about five months after the robbery of the gas station, one Jerry Cruz, Norberto Cruz's brother, was killed. The police interviewed Norberto several times during their investigation of that homicide. Norberto testified that only after petitioner "tried to take me to the place where they had killed my brother" (156),[2] did he tell the police that on November 29, 1981, five months earlier, petitioner and Benjamin came to his apartment and said that they had just robbed a gas station and killed the attendant. According to Norberto's trial testimony, petitioner's confession to him consisted entirely of the following:

> "Q. What did [petitioner] tell you?
>
> "A. That they had gone to give a hold up to a gas station and that he started struggling with him.

[2] Unprefixed numbers refer to the minutes of the trial, dated September 27-October 5, 1983. Numbers preceded by "A" refer to the pages of the Appendix attached hereto.

> THE COURT: Excuse me, speak up. Raise your voice.
>
> "A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station" (126).

Shortly after Norberto's statement to the police, Benjamin Cruz went to the police station and made a confession, recorded on videotape, to an assistant district attorney. In this 22-minute confession, Benjamin gave a finely detailed account of how he, Jerry Cruz, and petitioner had held up a gas station and killed the attendant. When petitioner was subsequently arrested, he made no statement to the authorities.

Petitioner had moved pretrial for a severance on Bruton grounds. The court reserved decision and ordered the trial to proceed (A. 29-34).[3] At a first trial before Justice Eggert, the People introduced the videotaped confession and Norberto Cruz testified to the defendants' admissions to him the day of the slaying. Neither defendant testified. Petitioner renewed his Bruton argument, but the court denied a severance (A. 35-39).

In its written decision (A. 22-28), the court found that petitioner's confession to Norberto Cruz and Benjamin's videotaped confession "interlocked" in terms of factual content. The court acknowledged that there was a "radical" difference in the level of reliability

[3] The pages of transcript in which petitioner raised the Bruton issue in the trial court are included in the Appendix hereto (A. 29-40).

that each confession was actually uttered (A. 24). It held, however, that for two confessions to come within the "interlocking confession" exception to the Bruton rule, there was no requirement in New York case law or this Court's decision in Parker v. Randolph, 442 U.S. 62 (1979), that "they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making, and the reliability of the evidence that the confessions were actually made" (A. 25-26).

The first trial ended in a mistrial because of juror misconduct. Prior to the second trial, counsel again moved for a severance. The court denied the motion based upon Justice Eggert's previous decision (order of Cerbone, J., dated September 26, 1983).

At the second joint trial, which resulted in the judgment appealed herein, Norberto Cruz testified as to the defendants' alleged confessions to him. Counsel for petitioner challenged the reliability of the alleged confession by eliciting, inter alia, Norberto's prior record, unsavory lifestyle, and his delay in coming forward with his information until after his brother was murdered (132-143, 156-159). Over petitioner's objection (A. 40), Benjamin's videotaped confession was played to the jury. Additionally, the People presented police testimony, forensic evidence and photographs which established the robbery and the killing, but not the identity of the culprits. Neither defendant testified, and the court gave

limiting instructions that each defendant's confession was admissible only against the defendant who made it.

The jury found the defendants guilty of the only count submitted to it, felony murder. The court sentenced petitioner to an indeterminate life sentence with a minimum of 15 years.

On appeal to the intermediate appellate court, the Appellate Division, First Department of the Supreme Court of the State of New York, petitioner argued, inter alia, that the failure to sever deprived him of his Sixth and Fourteenth Amendment right to confrontation. The Appellate Division affirmed the conviction without opinion on October 25, 1984. 104 A.D.2d 1060 (1984).

On October 17, 1985, the Court of Appeals, by a four to two vote, affirmed the Appellate Division's order. In its majority opinion, the Court agreed with the trial court's ruling that the disparity in reliability between the defendants' confessions was irrelevant in deciding the Bruton question: So long as the confessions interlocked as to factual content, the "interlocking confession" exception to the Bruton rule applied (A. 10-15). In dissent, two judges rejected:

> the per se rule now established by this case that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw

> evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed. The rationale of Bruton is otherwise rendered meaningless (A. 21) .

REASONS FOR GRANTING THE WRIT

> 1. Supreme Court review of this case will resolve the issue left open by Parker v. Randolph [422 U.S. 62 (1979)]: i.e., whether the Confrontation Clause of the Sixth Amendment is violated by the introduction against a defendant of his non-testifying co-defendant's confession, which interlocks with his own confession but which is far more inculpatory.

In Parker v. Randolph, 442 U.S. 62 (1979), the eight members of this Court sitting were evenly divided on the issue of whether "interlocking" confessions of criminal co-defendants were per se admissible as an exception to the holding of Bruton v. United States, 391 U.S. 123 (1968), that the admission of a non-testifying co-defendant's confession violated the Confrontation Clause of the Sixth Amendment. Four members of the Court joined a plurality opinion holding "interlocking" confessions always admissible, while four other members, including Justice Blackmun concurring in the judgment, adhered to the Bruton rule subject only to harmless error analysis. 442 U.S. at 77-91. This case again clearly presents the question of whether the admission of an "interlocking" confession can ever violate the Confrontation Clause. Here, the co-defendant's videotaped confession, held to

be factually interlocking with petitioner's alleged oral one by the New York Court of Appeals, was nonetheless uniquely damaging to petitioner's case, and under the Bruton rule its admission would have been reversible error. Accordingly, the Court should grant certiorari to resolve the question left open by the divided opinion in Parker v. Randolph.

The rationale for the opinion of the plurality in Parker was that when the defendants have made substantially the same confession, little prejudice can result from the inability of one defendant to cross-examine the other. Parker v. Randolph, 442 U.S. at 72-76 (plurality opinion). This reasoning is not adequate, since a determination that statements "interlock" does not in itself answer the crucial question of whether the admission of a co-defendant's confession, without cross-examination, is so prejudicial that it should not have been allowed, even with limiting instructions. More of an inquiry is needed. As Justice Blackmun succinctly stated in his concurrence in Parker,

> The fact that confessions may interlock to some degree does not ensure, as a per se matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such cir-

> cumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking.

422 U.S. at 79.

Although this Court granted certiorari in Parker to resolve a conflict in the circuits over whether Bruton applies at all to "interlocking confession" situations, 442 U.S. at 68 n.4, the conflict continues. Of the Circuits that have considered the issue post-Parker, at least three have adopted the harmless error standard set forth in Justice Blackmun's concurrence. United States v. Ruff, 717 F.2d 855 (3rd Cir. 1983); United States v. Espericueta-Reyes, 631 F.2d 616, 624 n.11 (9th Cir. 1980); United States v. Parker, 622 F.2d 298, 301 (8th Cir. 1980). The Seventh Circuit is openly undecided which approach to take. Montes v. Jenkins, 626 F.2d 584, 587 (7th Cir. 1980). At least three circuits have adopted the plurality reasoning. United States v. Kroesser, 731 F.2d 1509 (11th Cir. 1984); Tamilio v. Fogg, 713 F.2d 18 (2nd Cir. 1983), cert. denied, 104 S. Ct. 706 (1984); Poole v. Perini, 659 F.2d 730, 733 (6th Cir. 1981). For this reason, the Parker decision has been labeled "inconclusive" in resolving the analytical conflict. Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich L. Rev. 1379, 1421 (1979).

Petitioner's case is a prime vehicle for this Court to resolve the conflict. Assuming, as the New York Court of Appeals held, that petitioner's alleged confession to Norberto and Benjamin's videotaped confession interlock because they both constitute full confessions to the same crime, then, under the standard set forth by the Parker plurality opinion, no Bruton violation occurred. However, under the standard set forth in Justice Blackmun's concurrence, a Bruton violation did occur. Furthermore, the error could not be harmless since, in light of the gross disparity between the reliability of the evidence that the confessions were actually uttered, the jury would naturally have looked to Benjamin's confession to resolve its doubts about petitioner's.

As the Court of Appeals dissent noted, the disparity in the levels of reliability that each defendant's confession was made was "enormous" (A. 21). Benjamin's confession was memorialized on videotape by the prosecutor. It would be hard to imagine a recording method that would inspire greater confidence that the confession had actually been uttered. The "recorder" of petitioner's statement, Norberto, inspired much less confidence.[4] As

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[4] It should be noted that, while the facts contained in both confessions were more or less consistent with the physical evidence found at the homicide scene, only Benjamin's videotaped confession contained detail so realistic and minute that only someone who was present at the homicide scene could have uttered it. The minimal detail contained in petitioner's alleged confession to Norberto, on the other hand, could have come solely from second-hand knowledge of the crime that Norberto acquired from someone other than petitioner -- for example, Norberto's brother Jerry, a member of the robbery team.

the dissent also noted (A. 20), Norberto had a prior record; received welfare payments even as he plied his trade "on the street" as a mechanic; took household expense money from his brother Jerry, a professional felon, without (he claimed) asking him about the source of the money; and had earlier testified that it was Benjamin, and not petitioner, who had made the confession to him. Most significant, Norberto reported nothing of petitioner's alleged statement until his brother Jerry had been murdered and petitioner, as Norberto stated, "tried to take me to the place where they had killed my brother" (A. 20).

The dissent also pointed out that the videotaped confession filled in a logical gap in the People's case against appellant (A. 20). Only in Benjamin's videotaped confession is there clear and unequivocal evidence that Jerry Cruz, Norberto's brother, had taken part in the robbery/homicide. Thus, only the videotape explained to the jury why Norberto did not come forward with his information for five months (to protect his brother), and why the defendants went to Norberto's apartment after the crime (to pick up Jerry, not confess during a casual social call). Even the Court of Appeals majority conceded that the joint nature of the trial therefore "harmed [petitioner's] case tactically" by denying him "a more favorable atmosphere in which to attack his confession" (A. 16).

Other than the defendants' confessions, there was no direct evidence linking petitioner to the crime, as the dissent noted (A. 19).

In sum, despite the factually interlocking nature of the two confessions, as the dissent correctly concluded (A. 19):

> By no stretch of the imagination can it be said that the 22-minute videotaped confession . . . added no substantial weight to the government's case against defendant or did not fill in material gaps in the necessary proof against him.

Mere examination, therefore, of whether statements interlock to some degree cannot invariably answer the question whether there has been a violation of the Confrontation Clause, as the Parker plurality suggested. Rather, as the four other justices in Parker recognized, if a defendant has been unfairly prejudiced, "the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects." 442 U.S. at 79. The correct formulation was the one chosen by the concurrence in Parker, to determine whether the admission of the co-defendant's confession was harmless beyond a reasonable doubt pursuant to Harrington v. California, 395 U.S. 250 (1969). Since petitioner's conviction must be reversed under this formulation, this case merits a grant of certiorari to review the judgment below.

> 2. Supreme Court review of this case would clarify the issue left unresolved by the plurality opinion in Parker v. Randolph [422 U.S. 62 (1979)] of to what extent a co-defendant's confession must "interlock" with the defendant's own before its admission does not violate the Bruton rule.

The rationale for exempting from the Bruton rule cases where the accused has himself confessed was succinctly stated by the Parker Court:

> The defendant is "the most knowledgeable and unimpeachable source of information about his past conduct" (citation omitted), and one can scarcely imagine evidence more damaging to his defense than his own admission of guilt. Thus, the incriminating statements of a codefendant will seldom, if ever, be of the "devastating" character referred to in Bruton when the incriminated defendant has admitted his own guilt.

Parker, 442 U.S. at 72-73. The Parker plurality made no attempt to delineate when co-defendants' statements would interlock sufficiently to come within the exception. 442 U.S. at 79-80 (Blackmum, J., concurring).

In holding that there was no Bruton error in petitioner's case, both the trial court and the New York Court of Appeals held that a great disparity in the reliability of two confessions was irrelevant so long as they interlocked as to the essential facts of the crime. That interpretation of the plurality opinion in Parker exalts form over substance. So long as the co-defendant's confession is far more damaging to the defendant's defense

than his own, it should not matter that the damage is caused by a gross disparity in reliability rather than factual content.[5]

Given Norberto Cruz's tenuous reliability as a witness, the jury, looking solely at his testimony, could easily have doubted Norberto's claim that petitioner had confessed to him. Any such doubts, however, were easily resolved by reference to the videotaped confession. Because Norberto's testimony was the sole link between petitioner and the homicide, the jury's learning of Benjamin's video confession must have contributed to the verdict.

The correctness of the New York courts' determination that confessions can "interlock" notwithstanding vast differences in their levels of reliability is therefore open to serious question. A grant of certiorari would provide this Court with the opportunity to determine the extent to which statements must interlock before a co-defendant's confession is admissible under that exception to the Bruton rule.

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5 Moreover, part of the Parker plurality's rationale was that the defendant's own "unchallenged" confession would be no more devastating to his case than a co-defendant's confession. 442 U.S. at 73. Petitioner, however, mounted a substantial challenge to the reliability of his alleged confession by eliciting evidence that Norberto was an unreliable witness with a motive to frame the defendants.

CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE ORDER AND OPINION OF THE NEW YORK STATE COURT OF APPEALS.

Respectfully submitted,

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Counsel for Petitioner

ROBERT S. DEAN
Of Counsel
November 21, 1985

APPENDIX

State of New York
Court of Appeals

1 No. 413
The People &c.,
Respondent,
v.
Eulogio Cruz,
Appellant.

2 No. 414
The People &c.,
Respondent,
v.
Belton Brims,
Appellant.

(413) Robert S. Dean & William E. Hellerstein, NY Legal Aid, for appellant.
Mario Merola,DA, Bronx County(Mark L. Freyberg & Peter D. Coddington of counsel) for respondent.

(414)Bennett L. Gershman,White Plains, for appellant.
Kenneth Gribetz,DA,Rockland County(John S. Edwards of counsel) for respondent.

* * * * * * * * * * * * * * * * *

Case #413 - People v Cruz (Eulogio)

Order affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Jasen and Titone concur. Judge Kaye dissents and votes to reverse in an opinion in which Judge Meyer concurs. Judge Alexander took no part.

Case #414 - People v. Brims (Belton)

Order affirmed. Opinion by Judge Simons. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Titone concur. Judge Alexander took no part.

Decided October 17, 1985

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

SIMONS, J.

Defendant Eulogio Cruz has been convicted of murder second degree committed during the course of a gas station robbery in the Bronx. Defendant Belton Brims has been convicted of two counts of murder second degree and other crimes committed during the burglary of a private home in Spring Valley, New York. Both defendants were tried jointly with co-defendants and the principle issues submitted in these appeals are whether the courts' refusal to grant defendants' motions for severance resulted in trials impermissibly flawed contrary to the rule of

Bruton v United States (391 US 123; see, also, Roberts v Russell, 392 US 293), and if not whether reversal is nevertheless required because the prosecutions failed to meet minimum standards of fairness (see, People v Payne, 35 NY2d 22; People v La Belle, 18 NY2d 405). In each trial statements of the co-defendants and the defendants were received in evidence. The basis for defendants' claims are their assertions not only that the content of their non-testifying co-defendant's statements did not "interlock" with their own but that even if the statements were substantially the same, defendants were prejudiced because the reliability of the co-defendants' confessions, made in the controlled environment of a police station, to police officers and under circumstances rendering them more credible, was greater than that of defendants' alleged confessions, made to lay witnesses having motives to falsify. Because of this difference in reliability, defendants contend that the jurors must have used the co-defendants' statements to resolve any doubts about defendants' guilt, even though they were instructed not to do so. Defendant Brims urges other grounds for reversal but those claims are either unpreserved or harmless (see, People v Crimmins, 36 NY2d 230). Neither defendant challenges the sufficiency of the evidence and, in the absence of legal error, the convictions should be upheld.

There should be an affirmance. The introduction of a co-defendant's testimony may, in some instances, substantially impair the defendant's right to confrontation or to a fair trial. The confessions of the defendant and co-defendant in each of these cases interlocked, however, and even though they differed in length and in the circumstances under which they were made, the co-defendant's statements could properly be received with

appropriate limiting instructions, regardless of differences in their comparative reliability (People v McNeil, 24 NY2d 550, cert denied sub nom Spain v New York, 396 US 937; Parker v Randolph, 442 US 62). Because defendants' statements not only interlocked with those of their co-defendants, but also contained legally corroborated admissions of all the elements of the crime of which they were convicted, defendants were not denied a fair trial and the motions for severance were properly denied.

PEOPLE v CRUZ

Defendant Cruz was indicted with his brother, Benjamin, for the felony murder of a gas station attendant committed November 29, 1981. Jerry Cruz, who was not related to defendant, was also a participant in the robbery. Some five months later Jerry Cruz was killed and during the course of the investigation of the homicide, the police interviewed his brother, Norberto. Norberto told the police that defendant and Benjamin came to his apartment the morning after the gas station robbery and that at the time defendant was nervous and wearing a blood-stained bandage around his right forearm. Norberto said that defendant told him that he and Benjamin had gone to a gas station in the Bronx the night before intending to rob it and that during Eulogio's struggle with the attendant the attendant had bent down behind the counter, procured a gun and shot him in the arm. Defendant said that Benjamin then jumped up and shot the attendant. Norberto said Benjamin told him a similar account of the incident, although he did not explain to Norberto how defendant was injured or that the brothers had gone to the station that night intending to rob it. Norberto said that he

had offered to take defendant to the hospital for treatment of his wounds but defendant refused to go because to do so was "very dangerous". At the trial, Norberto testified that he had been a friend of Eulogio's for 25 years, since they had grown up together in Puerto Rico. He remembered the date Eulogio and Benjamin came to his apartment because his wife was discharged from the hospital that day. When asked on cross-examination why he had not gone to the police earlier with this information, Norberto said that he could not because his brother Jerry "had the event".

Shortly after Norberto's statements to the police, Benjamin Cruz learned that they were looking for him and went to the police station. While he was being questioned about the death of Jerry Cruz, he blurted out that he and defendant had killed the gas station attendant in the Bronx. Subsequently he gave a complete confession to the police which was recorded on video tape. Defendant and his brother were indicted together for felony murder.

Before the trial defendant moved for a severance, but the motion was denied (see, 119 Misc 2d 1080). Both Norberto's testimony implicating the brothers and the video tape of Benjamin's confession were received in evidence during the trial with appropriate limiting instructions. The first trial was aborted because of juror misconduct but the confessions were again received at a second trial which resulted in the judgment now before us convicting defendant. In addition, the People presented police testimony, forensic evidence and photographs which established the robbery and the killing, the location of the victim's body, the injuries to his face and the substantial

damage to the office, inferentially establishing defendant's struggle with the attendant before the murder. Also introduced was medical evidence of the trajectory of the bullets as they entered the victim's head from above, corroborating the evidence that Benjamin was above the attendant when he shot him. Defendant offered no evidence and both defendants were convicted of felony murder.

BELTON BRIMS

Defendant Belton Brims was convicted of two counts of intentional murder, two counts of felony murder, two counts of robbery first degree and two counts of burglary first degree. The charges arose out of an incident occurring December 28, 1980 when defendant and James Sheffield, with the assistance of Sheryl Sohn and Willie Brims, burglarized Sheryl's home and killed her parents. On January 1, 1981 defendant was arrested in New York on three other felony charges. He was a prime suspect in the Sohn murders at the time but, after he waived extradition, he was returned to New Jersey to answer felony charges against him there. Brims was subsequently convicted in New Jersey of armed robbery and sentenced to a term of imprisonment of twenty-five years to life. In the meantime, defendant, Sheryl Sohn and James Sheffield were indicted in New York for multiple charges arising out of the Sohn homicides. Defendant was returned to New York and the three defendants were tried together.

None of the defendants testified, but Sheryl Sohn's confession to the police, in which she told the police that she had helped Brims and Sheffield enter her parents' home the evening of the crime, was received in evidence against her. She said she had met the two men at a bar and told them she would

unlock the door for them; they could await her parents' return from a party and then, when they returned, rob them. She also agreed that they could have all the valuables they found, except for a diamond ring which her mother would be wearing that she wished for herself. Sheryl said that defendant and others left for the house while she remained at the bar with a friend, but they returned shortly thereafter and told her they were unable to get in. She went home, checked the door again to insure that it was unlocked, and then returned and told defendant and Sheffield. Apparently they were still unable to enter the house and returned to the bar a third time. At that time Sheryl explained the floor plan of the house to the defendants and they left. Her oral statements were later reduced to writing and admitted at the trial. Her statement was redacted to eliminate references to other crimes but the names were left in it.

The People introduced two prior statements by defendant. One was made to his cousin, Willie Brims, who had gone to the Sohn house with defendant and Sheffield but remained in the car while they were inside. Willie Brims was not charged with any crime despite his participation that night. He testified about the several trips from the bar to the house and return while defendant and Sheffield tried to gain entry, about leaving the house after the crime, and about the place where the participants had disposed of various pieces of evidence that night. Willie testified that when defendant returned to the car after leaving the Sohn's house on the night of the crime, he told him that he had "done some serious business" inside. Defendant explained that statement to him a few days later. He said that when the Sohns had returned to the house that night Sheffield

"had beat [Mr. Sohn's] brains out with the butt of a gun" and that he had "drowned the bitch". Defendant said he had made Mrs. Sohn drink gin before drowning her and that she had fainted when she saw her husband assaulted. He then dumped her into the bath tub he had filled with water, face down. During this conversation with Willie, defendant showed him a photo of Jackie Shoulders and said she was his girlfriend. Defendant told Willie to "be cool" and in thirty to ninety days they would be paid [for the jewelry].

The People introduced another statement of defendant made to John Riegel, a New Jersey prisoner occupying a cell near defendant during his incarceration there in January, 1981. Riegel had been a former assistant bank vice-president and private entrepreneur who, after a series of financial setbacks, had turned to crime. Between 1977 and 1981 he had been the subject of several charges involving forgery, issuing bad checks and the use of stolen credit cards.

Riegel testified that, during the nine days they were together in jail, defendant told him that he had planned the Spring Valley robbery with the slain couple's daughter, that he and his partner had waited in the house until the victims had returned home and that he had drowned the woman. Defendant said he had told his partner to kill the husband by hitting him over the head. Riegel said that defendant claimed he had received about twenty to twenty-two thousand dollars in the robbery and that all the daughter wanted for her help was a diamond ring. Defendant also told him that he had given part of the jewelry to a young girl from Virginia (Jackie Shoulders). Defendant was worried because her name was on a slip of paper in his pants

pocket and, if the police found the slip and located her, they would discover that she had received from him a valuable piece of jewelry missing after the robbery.

There was substantial evidence to corroborate these confessions, indeed the evidence of defendant's guilt was overwhelming. Some of the more significant items included evidence of blood discovered in Willie's car in places consistent with his testimony about his passengers and where they entered and exited the car after the killings, and the ski mask and gun used the evening of the crime, found discarded as he had described. Forensic evidence was introduced which established that the gun was broken and that the pattern injuries on Mr. Sohn's skull exactly matched its shape. Forensic evidence also established that blood found on defendant's sneakers after the crime was the same, a very rare blood type possessed by Mr. Sohn. Defendant attempted to establish an alibi, that he was in New York City acquiring drugs for Sheryl at the time of the killing, but even his witnesses failed to support his alibi.

The Legislature has provided that the prosecution of two or more parties charged with the same offense or offenses may be joined for trial (CPL 200.40). Recognizing that joinder results in prejudice, however, it granted the court the power to order separate trials when the public policy considerations of trial convenience, economy of judicial and prosecutorial resources and speed which underlie the statute are outweighed by unfairness to the accused. An application for severance is addressed to the Trial Judge's discretion. He must decide whether possible unfairness will result, whether it can be minimized by measures short of separate trials or whether

severance is required. Normally, the trial court's ruling on the motion will not be disturbed but his discretion is not absolute, nor is his determination final, for "[a] retrospective view by an appellate court may reveal injustice or impairment of substantial rights unseen at the beginning" (People v Fisher, 249 NY 419, 427). Accordingly, we may properly review the courts' severance rulings in these two appeals.

When two defendants are tried together, the extra-judicial statement of one is hearsay as to the other and, if the statement is admissible at all, it may be admitted only when the jury is properly instructed that it may not consider one defendant's statement as evidence in assessing the guilt of the other. In Bruton the Supreme Court held that because of the substantial risk that a jury, despite such instructions to the contrary, will look to the incriminating extra-judicial statements of a non-testifying co-defendant, admitting such a confession violates defendant's right of confrontation (Bruton v United States, 391 US 123, supra; see, also, People v Safian, 46 NY2d 181, 187, cert denied 443 US 912). A recognized exception to the Bruton rule holds that if the statements of the defendant and co-defendant are substantially identical, or "interlock", there is no violation of defendant's right to confrontation. The rationale is that if the statements interlock, the co-defendant's statement is no more inculpating than is defendant's statement. It can hardly have the "devastating effect" on defendant's case referred to in Bruton if defendant similarly has admitted his complicity in the crime (see, People v McNeil, 24 NY2d 550, 553, supra). Key also is recognition that the right to confrontation is not absolute (Dutton v Evans, 400 US 74, 89;

People v Sugden, 35 NY2d 453, 460). The confrontation clause is intended to insure fairness and accuracy by giving a defendant an opportunity to challenge evidence against him, particularly a co-defendant's statement, even though the jury may not consider it, because of the natural tendency of a co-defendant to shed blame and implicate his accomplice. The danger that the jury will consider unreliable hearsay is minimized, however, when the defendant has confessed. For these reasons, the interlocking confession exception to the Bruton rule was recognized early by this Court (People v McNeil, supra; People v Galloway, 24 NY2d 935) and by lower federal courts (see, e.g., United States ex rel. Catanzaro v Mancusi, 404 F2d 296, cert denied 397 US 942 [CCA 2]; Mack v Maggio, 538 F2d 1129 [CCA 5]; United States v Walton, 538 F2d 1348 [CCA 8], cert denied 429 US 1025; United States v Spinks, 470 F2d 64 [CCA 7], cert denied 409 US 1011; Metropolis v Turner, 437 F2d 207 [CCA 10]; but cf. United States v DiGilio, 538 F2d 972 [CCA 3], cert denied sub nom Lupo v United States, 429 US 1038) and the Supreme Court of the United States has similarly recognized it (Parker v Randolph, 442 US 62). Indeed, one observer has interpreted the plurality opinion in Parker as holding that, as long as the defendant has confessed, "interlocking" is not required (see, Dawson, Joint Trials of Defendant in Criminal Cases; An Analysis of Efficiencies and Prejudices, 77 Mich L. Rev. 1379, 1421; but see, Parker v Randolph, 422 US 62, supra, at 75).

Confessions are "interlocking" if their content is substantially similar (People v Smalls, 55 NY2d 407, 415; People v Safian, 46 NY2d 181, supra, at 184; Forehand v Fogg, 500 F Supp 851, 853; compare People v McNeil, supra, at 552 ["almost

identical"]). The statements need not be identical, it is sufficient that both cover all major elements of the crime involved (see, People v Woodward, 50 NY2d 922; People v Berzups, 49 NY2d 417, 425; Tamilio v Fogg, 713 F2d 18, 20) and are "essentially the same" as to motive, plot and execution of the crimes (United States ex rel. Ortiz v Fritz, 476 F2d 37, 39; Forehand v Fogg, supra; cf. United States v Kroesser, 731 F2d 1509). Statements are substantially similar when defendant's confession is close enough to the co-defendant's with respect to the material facts of the crime charged to make the probability of prejudice so negligible that the end result would be the same without the co-defendant's statement (People v Berzups, supra, at 425; People v Safian, supra, at 188; see, also, People v Fisher, 249 NY 419, 426). Confessions do not "interlock" if a co-defendant's confession may be used to fill material gaps in the necessary proof against defendant (see, People v Smalls, supra; People v Burns, 84 AD2d 845).

The two sets of confessions before us interlock. There are differences, of course. There always will be, given human nature, the variations in human recall and the manner in which witnesses testify. Indeed, as a practical matter the evidence of witnesses is usually more suspect if they harmonize too closely. But the Cruz brothers agreed, in their separate statements, on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how defendant was injured and the station attendant killed. Although Benjamin's statement was substantially longer, the details included did not contradict or modify the essential elements of defendant's statement. The content of the confessions in Brims was markedly

different, more because Sheryl Sohn had not entered the house and did not know or apparently contemplate that homicides would occur. But to the extent of her knowledge of the crime, her statement fully interlocked with defendant's two confessions. Thus, she described the agreement with defendant and Sheffield, the several trips to the house to provide entry and the arrangement for disposition of the jewelry. Sheryl's confession, admissible only as to her, could hardly have prejudiced defendant whose recitation in his confession of the same events she described was substantially similar. Indeed, it is difficult to perceive how Sheryl's confession, which described only the preliminary arrangements with defendant, could have a "devastating" effect on defendant in view of his two confessions reciting the gory events that took place once he and Sheffield entered the Sohn home and murdered Sheryl's parents (cf. People v Smalls, supra).[1]

Defendants' major complaint is not that the content of the confessions was dissimilar but that they differed in reliability: in the Cruz case Benjamin's 22 minute video-taped confession to the police was contrasted with defendant's oral confession to a friend with a possible motive to falsify[2] that was not revealed to the police for five months; in Brims a written confession to police officers was compared to oral

1. On a related point made by defendant Brims, there was no error in receiving his two confessions although they differed in minor detail. Neither was hearsay as to him.

2. Defendant speculates that Norberto may have sought revenge against him for the death of Jerry Cruz. There is nothing in the record to support that claim.

confessions to, first, an accomplice who was extended leniency by the prosecutor and, second, a fellow prisoner awaiting disposition of the charges against him.

The contention that the exception to the Bruton rule for interlocking confessions does not apply when the confessions differ as to reliability has been rejected by this Court (see, People v Woodward, 50 NY2d 922, affg 66 AD2d 866 [see, dissenting opn of Shapiro, J. for facts at p 866]) and other courts (see, People v Santanella, 63 AD2d 744, lv to app denied sub nom People v Tamilio, 45 NY2d 784, cert denied sub nom Tamilio v New York, 443 US 912; Tamilio v Fogg, 713 F2d 18, revg 546 F Supp 364). Indeed, when the rule was announced it was both anticipated that there would be differences in the scope and reliability of the confessions, and accepted that such differences would be tolerated (see, dissenting opns in People v McNeil, 24 NY2d 550, supra, and Parker v Randolph, 442 US 62, supra). Thus, decisions following the McNeil case have held that the use of the confessions is not foreclosed because one confession is oral and the other is written (People v Woodward, supra; Parker v Randolph, supra) because one is made to police officers and the other to lay witnesses (Tamilio v Fogg, supra), or because one is long and the other is short (see, People v Woodward, supra; People v Safian, 46 NY2d 181, supra). Nor is the rule any different because defendant repudiates his confession or challenges its voluntariness. None of the confessions in these two prosecutions was unreliable as a matter of law and once admissibility was determined by the court, credibility was a question for the jury (People v Woodward, supra; People v Anthony, 24 NY2d 696, cert denied 396 US 991; United States ex rel. Dukes v Wallack, 414 F2d

246, 247; United States ex rel. Catanzaro v Mancusi, 404 F2d 296, supra).

Defendant Cruz argues that, quite independent of any error in ruling on his constitutional right of confrontation, he is entitled to reversal because the trial violated fair-trial standards applicable to trials in New York involving multiple defendants and the violation resulted in "injustice or the impairment of substantial rights" (see, People v Payne, 35 NY2d 22, 26-27, supra; People v La Belle, 18 NY2d 405, 409, supra; People v Fisher, 249 NY 419, 427, supra; People v Evans, 99 AD2d 452). Defendant's right under that standard is broader than his right to confrontation. It may be violated even where the co-defendant has remained silent both before and during the trial or conversely has chosen to testify. A defendant's right to a fair trial is not impaired, however, when there is substantial evidence of guilt independent of the co-defendant's statement (see, People v Fisher, supra, p 426), or when the defendant has himself made inculpatory admissions substantially identical to those offered against him, and that admission, properly corroborated, establishes the crime (see, People v Snyder, 246 NY 491), i.e., when the error is harmless or when there is no substantial risk of prejudice. Defendant's fair trial rights are violated, however, when he is prevented, because of the complexities of a joint trial, from presenting exculpatory evidence (see, People v La Belle, supra), or when, although defendant's right to confrontation has not been impaired, his co-defendant's confession includes material evidence of crime which results in substantial prejudice to defendant by filling gaps in the evidence against him. Thus, in Payne a severance was ordered because defendant's

confession implicated him in lesser criminal activity, but did not resolve the question of whether he was guilty of felony murder. The court found a substantial risk that the missing evidence could be filled, and apparently was, by reference to the co-defendant's confession (People v Payne, supra).

The statement of defendant contained all the necessary elements to incriminate him in the felony murder. It interlocked with Benjamin's statement and it was corroborated by independent evidence sufficient to warrant the jury in accepting it as true, and sufficient to support a guilty verdict. That being so, the trial court could properly deny severance finding, in the sound exercise of its discretion, that there was no substantial risk that the jury would borrow information from Benjamin's hearsay statement to fill gaps in the evidence against defendant. If defendant was prejudiced by the joint trial, the prejudice resulted not from the fact that Benjamin's statement added substantial weight to the proof of defendant's guilt but from the fact that the denial of a severance prevented defendant from obtaining a more favorable atmosphere in which to attack his confession. That may have harmed his case tactically, but it did not deny his fundamental right to a fair trial (see, United States v Losada, 674 F2d 167, 171; United States v Werner, 620 F2d 922, 928).

Somewhat similar to defendant Cruz's fair trial claim is defendant Brims' claim that he was prejudiced because he was prevented from calling Sheryl Sohn as a witness. There was nothing before the court, however, to indicate that Sheryl would testify for defendant or that her testimony would tend to

exculpate him if she did (see, People v Owens, 22 NY2d 93, 97-98; People v Kampshoff, 53 AD2d 325, 338, cert denied 439 US 911).

Finally, defendant Brims contends that the defendants' defenses were antagonistic. A claim of antagonism may arise from a variety of circumstances, not easily cataloged, but it is clear that severance is not required solely because of hostility between the defendants, differences in their trial strategies or inconsistencies in their defenses. It must appear that a joint trial necessarily will, or did, result in unfair prejudice to the moving party and substantially impair his defense (People v La Belle, 18 NY2d 405, supra; People v Papa, 47 AD2d 902; see, generally, Anno Antagonistic Defenses as Ground for Separate Trials of Co-defendants in Criminal Case, 82 ALR3rd 245; Dawson, Joint Trials of Criminal Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich L Rev 1379, 1422-1425). Indeed, some courts have looked to see if the defenses are directly and mutually antagonistic before granting a severance, believing that the accuseds are not entitled to separate trials if one defendant seeks to exculpate himself by inculpating the other (see, Rhone v United States, 365 F 2d 980; People v Braune, 363 Ill 551, 2 NE2d 839).

It was Brims' contention at trial that he was innocent of the crime, that he had seen Sheryl Sohn that evening, but that he had been in New York City obtaining drugs and returned only after the murders had been completed. He claimed that he obtained the Sohn jewelry from a friend of Sheryl's in exchange for supplying her with drugs. Sheryl Sohn's principal defense was to contest the voluntariness of her confession for, without it, there was no case against her. Failing this, she sought to

establish that she did not actively participate in the robbery-murder and that she did not know the perpetrators would be armed. There were a few questions designed to establish that she acted out of fear of Brims because of money she owed him for prior drug transactions, but the evidence of duress was so slight that counsel neither argued the point in the summation nor requested a charge on it. Despite defendant's general claims that Sheryl Sohn's presence in the trial impeded his defense or reflected unfairly on him by causing the jury to unjustifiably infer he was guilty, there is nothing before us to establish that he was prevented from presenting exculpatory evidence by the court's desire to protect his co-defendant's rights. His present claim that he was prevented from establishing that he received the jewelry from Sheryl as payment for her prior drug purchases is contrary to his testimony at trial.

Accordingly, in each case, the order of the Appellate Division should be affirmed.

People v Cruz
No. 413
JSK (dissenting)

With respect to People v Cruz, today's decision falls far short of the standards recognized by the majority. The concern expressed in Bruton v United States (391 US 123) was that substantial weight would impermissibly be added to the government's case ''f a codefendant's powerfully incriminating extrajudicial statements, not subject to cross-examination by defendant, were admitted at a joint trial. The exception to the Bruton rule for "interlocking confessions" rests on the premise that where two confessions are virtually identical, the jury in assessing defendant's guilt gains little or nothing from the co-defendant's confession. But confessions do not interlock if the co-defendant's confession may be used to fill material gaps in the necessary proof against defendant.

By no stretch of the imagination can it be said that the 22-minute videotaped confession of defendant's brother to the prosecution -- inadmissible against defendant -- added no substantial weight to the government's case against defendant or did not fill material gaps in the necessary proof against him. The only direct incriminating evidence against defendant was his alleged statement to Norberto (see, People v Cruz, 119 Misc2d 1080, 1084), recapitulated in one question and answer during Norberto's brief testimony:

"Q. What did [defendant] tell you?

"A. That they had gone to give a hold up to a gas station and that he started struggling with him.

THE COURT: Excuse me, speak up. Raise your voice.

"A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station."

Norberto had a prior record; worked intermittently "on the street" as a mechanic and received welfare payments for his family of six; accepted money from his brother, Jerry, who lived with him, though he testified he had no notion of how Jerry got that money; testified earlier that Benjamin -- not defendant -- had made the confession to him; and most significantly, reported nothing of defendant's alleged statement to him for five months, until after his brother Jerry had been murdered and defendant, in Norberto's words, "tried to take me to the place where they had killed my brother."

The videotape played to the jury, by contrast, was a 22-minute depiction of the crime by defendant's own brother, explicitly detailing his role as well as defendant's. In its reliability it was so overpowering that it necessarily added credibility to Norberto's testimony, and erased the indicia of nonreliability. As an example, while Norberto in his testimony related only that Benjamin and defendant had gone to hold up the gas station, Benjamin in his confession stated that several persons, including Norberto's brother Jerry, had done many hold-ups together including the one in issue. This clear statement* of Jerry's complicity explained for the jury not only why Norberto had not come forward with defendant's statement for five months, but also why defendant and Benjamin would have gone to Jerry's residence just after the crime. The jury could hardly have avoided looking to Benjamin's confession to resolve any doubts about whether his brother had in fact confessed to Norberto.

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* Without Benjamin's vivid exposition, the only evidence to fill this logical gap is Norberto's meaningless, or at best ambiguous, comment that he did not come forward sooner because his brother "had the event."

The issue is simply whether on these facts there should have been a severance. I do not find in the prior decisions of this Court the per se rule now established by this case that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed. The rationale of Bruton is otherwise rendered meaningless. I would reverse the order below and order a new trial.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 62

THE PEOPLE OF THE STATE OF NEW YORK

- against -

EULOGIO CRUZ,

Defendant.

DECISION

Indictment #2232/82

EGGERT, J.:

The following constitutes the decision and order of the court on defendant Eulogio Cruz' motion for a mistrial and severance.

This case presents the question whether the "interlocking confessions" exception to the rule in Bruton v. United States, (391 US 123) applies when a co-defendant at a joint trial makes a confession to the authorities implicating the defendant and the defendant makes an "interlocking" admission to a private citizen acquaintance, rather than to the authorities.

Bruton (supra) holds that it is error to permit a defendant to be tried jointly with a co-defendant where the co-defendant has made a confession which will be introduced against him and which also implicates the defendant, (assuming the co-defendant does not testify). This is because the defendant has no way of cross-examining his co-defendant as to this damaging testimony, and it would be futile for the court to give instructions limiting the co-defendant's statements to the co-defendant himself.

Nevertheless, our Court of Appeals has long recognized an exception to Bruton, "where each of the defendants has

himself made a full voluntary confession which is almostidentical to the confessions of his co-defendants" (People v. McNeil, 24 NY 2d 550, 552). This exception, which was approved by a plurality of the Supreme Court of the United States in Parker v. Randolph., (442 US 62) would permit receipt of the co-defendant's confession at a joint trial, with instructions that it is evidence against the c0-defendant only.

The pertinent facts are as follows:

The two co-defendants, Benjamin and Eulogio Cruz, who are brothers, are charged with felony murder and robbery in connection with a gas station holdup in which Benjamin allegedly shot and killed the attendant while Eulogio actively participated in the holdup. The only evidence connecting Eulogio with the crime is the testimony of his acquaintance, Norberto Cruz (no relation) that shortly after the crime both Cruz brothers came to Norberto and boasted of their involvement in the holdup and admitted their full criminal liability. Many months later, after Norberto had had a falling-out with the Cruz brothers, he revealed these admissions to the police while the police were conducting another investigation. Norberto was not a suspect in this or any other crime at that time and there is no claim that he was offering these revelations in return for lenient treatment from the police. Eulogio made no statement to law enforcement authorities.

Benjamin made a statement to the police and then a more detailed statement on videotape to an Assistant District Attorney.

In his statements he admits that he was the shooter and gives a detailed account of his brother Eulogio's participation in the crime. These statements by Benjamin are being received as evidence against Benjamin at the trial. Benjamin is not testifying at the trial.

The two statements interlock fully as to the details of the crime and as to the full liability of each defendant for the crimes charged. The significant difference between the statements is as follows: While there is no dispute that Benjamin's videotaped statement was actually made, Norberto's account of his conversation with the Cruz brothers is being attacked as a fabrication.

Eulogio moved for a severance prior to trial and this Court denied the motion with leave to renew at the close of the trial evidence. At the end of the trial evidence Eulogio moved for a mistrial and renewed his motion for a severance.

To determine whether the "interlocking confessions" exception applies to confessions made under the radically different circumstances present in this case, we turn to the oft-stated rationale for this exception: "The justification for this exception is that separate confessions, without being mirror images of each other, may yet be so duplicative in their description of the crucial facts that the one of the non-testifying co-defendant may be of no measurable consequence in the face of the overwhelming and largely uncontroverted evidence

contained in the interlocking confession of the defendant himself (citations omitted)", (People v. Berzups, 49 NY2d 417, 425). Consequently, the exception only applies where the contents of the two confessions fully interlock as to the facts, or at least interlock to the extent that the defendant is unambiguously admitting criminal liability for the crime charged (People v. Berzups, supra, at 426).

For example, in People v. Smalls (55 NY 2d 407) the co-defendant made a confession in which he directly implicated the defendant as a knowing participant in the crime, while the defendant, on the other hand, made a confession which was ambiguous as to his knowing participation. The Court of Appeals held that it was error to jointly try the defendant and co-defendant and admit the co-defendant's confession because of the danger that the jury might have resolved the ambiguities in the defendant's confession by reference to the co-defendant's confession. Thus, the co-defendant's confession, which was not subject to cross-examination, would have added substantially to the case against the defendant (see also People v. Burns, 84 AD 2d 845).

It is clear that the interlocking confessions exception requires the confessions to interlock as to content. However, there does not appear to be any requirement in the case law that they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making, and

the reliability of the evidence that the confessions were actually made (see People v. Woodward, 50 NY 2d 922).

In the instant case, defendant Eulogio Cruz argues that "interlocking" as to content is not enough. Here, Eulogio contends that he never made a confession to Norberto, and claims that Norberto made up the whole story out of malice and other unworthy motives. However, in view of the videotaping, it is undisputed that Benjamin did in fact make an interlocking confession implicating Eulogio. Therefore, defendant argues that the reasoning of People v. Smalls (supra) should apply with equal force, since there is a grave danger that a jury would resolve any doubts about whether Eulogio in fact confessed to Norberto by making reference to Benjamin's video confession.

While this argument may appear to have some merit it is the same argument unsuccessfully raised by the dissenters in the leading cases which established the interlocking confessions exception at the State and Federal levels. In People v. McNeil, (supra at pp. 555-556), Chief Judge Fuld pointed out in his dissent that if there is a question about the truth or voluntariness of a defendant's confession, a jury might improperly resolve that doubt by reference to a co-defendant's confession. In Parker v. Randolph (supra at pp. 84-85), Justice Stevens' dissent posed the hypothetical situation in which a co-defendant confesses on live television and implicates the defendant, while the defendant himself makes an "interlocking confession" which is vaguely recalled by a drinking partner, former cellmate, or a divorced spouse. Notwithstanding these arguments, the highest

courts of this State and Nation have recognized an interlocking confession rule which does not depend on the reliability of the defendant's own confession.

In Tamilio v. Fogg, 546 F. Supp. 372, the petitioner argued that under Parker v. Randolph (supra), the interlocking confessions exception does not apply if the defendant attacks his own alleged confession as a fabrication. The District Court (Neaher, J.) rejected that interpretation of Parker on the grounds that it would allow any defendant to avoid the interlocking confession rule by merely disclaiming his own confession. (The court did grant habeas corpus relief on the grounds that the confessions were not fully interlocking and because the fact that the petitioner's alleged confession was a highly suspect confession to a cellmate added to the prejudice caused by the improper receipt of the co-defendant's confession at the joint trial [See People v. Santanella, 63 AD 2d 744]).

As a final note, in this case defendant Eulogio Cruz' confession to Norberto is not so utterly unreliable as to render the use of the co-defendant's videotaped confession inherently prejudicial. While Norberto, not surprisingly, made no immediate outcry about his then-friend's startling revelations, his testimony could easily have been credited beyond a reasonable doubt by a jury, regardless of the videotaped confession by Benjamin, which itself was vigorously attacked at the trial by Benjamin, who

contended that it had been coerced and staged by the police.

Accordingly, defendant Eulogio Cruz' motion for a mistrial and severance is denied.

Dated: June 10, 1983

FRED W. EGGER J.S.C.

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possibly influence the jury. It would normally be allowed, but in view of the fact that he has two other burglary convictions--granted.

mr. blitz; The charge here, pur Hnoor, I would ask the Court to dismiss that charge.

THE COURT: I'd like to hear your argument on that more detailed.

MR. BLITZ: I'm being facetious, your Honor. I"m moving for a severance in fact.

THE COURT: That' brings us to the Bruton Issue.

Now Mr. Katz, at this point, do you contemplate that your defendant will testify on the trial?

MR. KATZ: Well your Honor, ~~xxx~~ that is a possibility. I'm reserving my right, of course, based upon the People's case. If I feel the People have not ~~xxxxxx~~ met their burden, obviously I will not pu myclient on, but rest. But should something come about duringthe People's case where I feel that it is in the best interests of my client to testify, that I certainly will reserve the right to call him.

THE COURT: All right. On Bruton, Mr. Blitz, do you wish to be heard?

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MR. BLITZ: Yes, judge.

Your Honor, the testimony is that Mr. Benjamin Cruz, of whom we have seen a video tape, inculpates my client in the crime thatis charged, that' has' charged with in the indictment, and all the counts therein, your Honor. Should he not testify, I owuld have no opportunity to confront him, to cross-examine him.

Certainly, your Honor, that video tape is devestating as far as my client is concerned, and I don't see how my client could get a fair trial, even with any curative instructions to the jury to disregard it.

I don't see how they could disreg ard it in fairness, and how e could possibly not be prejudiced by the statement, should Mr. Cruz not testify on the trial itself.

At this point, your Honor, we don't nkow if he's going to testify an d certainly, your Honor, I don't want to take that risk because if he doesn't testify, I have no opportunity to cross-examine any statements that he made or anything that he may have said in the video tape.

THE COURT: Mr. Rosenblatt?

MR. ROSENBLATT: Your Honor, I just want to submit to the Court that I've turned over certain Grand Jury testimony and the People intend to call a particular witness that will testify as to what the defendant Benjamin Cruz told him, and whatthe defendant Eulogio Cruz told him in the presence of each other, and the People submit, your Honor, that we have a statement made by the defendant Benjamin Cruz to Detective Wood.

We have also a video statement of a statement made by Benjamin Cruz to A.D.A. Karen, coupled with a--with statements that were made to a third party, even though the third party wasnot a public officer or a police officer.

I respectfully submit, your Honor, that these statements made to a third party and which the third party testified before the Grand Jury, takes it out of the Bruton issue, your Honor, because they were made to a third party and I don't know of any case where it says it must be made only to a police officer or to a public official, to take it out, but what's very important, your Honor, it was made in the presence of each defendant and the People intend to be calling that particular

witness.

I want to state to the Court that I personally interviewed that witness and not only did he tell me what was more or less testified in the Grand Jury, he will go on to other matters that were not testified in the Grand Jury.

So in view of that, and in view of all these statements are somewhat interlocking, that would come under the Mac Neal cases, and the subsequent cases, they are interlocking and they are interwoven and the People feel that this situation will take it out of the Bruton problem.

THE COURT: Did each, at the time of the alleged statements that were made to the civilian that you just mentioned, were separate statements made by each defendant?

MR. ROSENBLATT: Well, these were statements that were made to my interrogation of a witness shortly thereafter the shooting and in the presence of each other.

THE OUT: That'snot my question. I'm not talking about in the presence of each other, but did each one make a separate statement?

MR. ROSENBLATT: It is my understanding of my

interrogationof the particular witness, each of them said certain things.

In otherwords, Benjamin Cruz told h this witness, ad Eulo gio Cruz told this witness something.

THECOURT: Yes, Mr. Blitz?

MR. BLITZ: Your Honor, as far as the record is concerned, there is nothing particular this Court--for this Court to make a determination. Number one, whether a statement was in fact made. Number two, whether t was made by my client. And number three, in what ~~xxxxxxxxxxxxx~~ ways it ~~xxxxxxxxxxxxx~~ could possibly be interlocking to take it out.

If anything, I believe this Court must conduct a hearing to determine whether that statement is in ~~xxxxx~~ interlocking, whether it was ~~x~~ fact made by my client, ~~x~~ and what was alleged to have been said by my client. There is nothing in the record to ~~xxx~~ show that a statement had been amde for what that statement contained, your Honor.

TH COURT: Well, since there appears to ~~x~~ be a questionof fact on whether or not it's interlocking, the Court will reserve decidion on the Bruton Issue.

We;ll research with the joint trial, but I'm reserving on your motion, Mr. Blitz.

MR. BLITZ: All right.

THE COURT: All right. Gentlemen, how do we stand with the jury panel?

COURT CLERK: Should be ready.

THE COUT: All right. Send for them, please.

(Hearing concluded)

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT FROM MY STENOGRAPHIC NOTES.

Kenneth A. De Corso, C.S.R.

SENIOR COURT REPORTER

thereof is denied.

The Court believesthat there is sufficient evidence here to warrant submission to the jury.

MR. BLITZ: At this time, your Honor, I respectfully move for a mistrial. If I rested now, the jury would have before it, the testimony and the video tape of Benjamin Cruz, and despite your Honor's curative instructions and the testimony of Ronda, the Spanish Interpreter of Wood, of all the statements allegedly made by Mr. Benjamin Cruz. Despite your Honor's curative is instructions, how could the jury possibly put that out of his mind, out of their minds and how could they --- my client possibly get a fair trial?

It certainly is a Bruton situation that cannot be compared as two separate statements, your Honor, or interlocking statements. This is a video tape of a co-defendant, and I don't see how the jury can deliberate and put that out of their mind and deliberate solely on what was presented against my client.

I respectfully move for a mistrial.

THE COURT: Mr. Rosenblatt.

MR. ROSENBLATT: I just want to state, your

Honor, that as Mr. Blitz said, is true of the video tape. But in this situation, your Honor, we go a step further. We have an independent witness that has testified and given evidence to this Court, in which he stated that both Benjamin Cruz told him what happened on that morning and what happened is what Eulogio Cruz told him in the presence of each other, Judge, and that all three were present, and they both describe as to the incident, and what they were doing; that they were going to rob this gasoline station, and during the struggle, between Eulogio Cruz and the deceased, that this defendant, Benjamin Cruz, did shoot and kill the deceased.

Now, both of these statements of their complicity that both of these defendants were told to the witness and in their presence, I respectfully submit, your Honor, that this takes out of the Bruton situation because the whole thing is part and parcel of one transaction, more or less, and that this case does not fall within the Bruton theory of severence

THE COURT: While counsel has moved for a mistrial, I assume, actually, it's a motion for a severence, insofar as the defendant, Eulogio Cruz,is concerned.

MR. BLITZ: It's too late for a severence now, your Honor.

THE COURT: Pardon?

MR. BLITZ: It's too late for a severence now.

THE COURT: No, it's not.

The motion for a mistrial is denied.

We have testimony here by the defendant, Benjamin Cruz inculpating the defendant, Eulogio Cruz. On each occasion that the defendant, Benjamin Cruz, made those statements, the Court gave an immediate curative instruction. In fact, it gave such instructions to the jury, approximately, five or six times. I am aware of course, of various cases hold that curative instructions are insufficient for what's real stick about it. However, we have more than just the statement of the defendant, Benjamin Cruz. There was the testimony of Norberto Cruz, who is not a defendant in this action, but who testified to inculpatory statement made by the defendant Eulogio Cruz as well as the defendant Benjamin Cruz.

Cases do not require that the interlocking statements interlock in every element. It's pointed out in the Bursoff case (Phonetic), in both statements the defendants each put themselves at the scene of the

crime and indicated a common participation in the crime; and the Court in Sursoff's(Phonetic) case held that that was sufficient, even though there could be minor differences in the statements. So, it would appear here that there is four interlocking --- There are interlocking confessions, but nonetheless, I previously have denied your motion, Mr. Blitz, for a severence, conditionally, pending on certain further testimony.

I will again deny your motion for a severence conditionally pending further testiony in this case.

MR. BLITZ: Exception, your Honor.

THE COURT: The motion for a mistrial is denied. The motion for a severence is denied conditionally, as indicated.

Now, you may have some witnesses tomorrow, Mr. Katz.

MR. KATZ: I anticipate, your Honor, if the calls went through. Mr. Rosenblatt indicated that they have Detectives Tonnelli, Police Officer Zuba. I anticipate each one of their testimony to be ten or fifteen minutes, at most, depending upon cross and also, I will probably call defendant Cruz's mother, Miss Ramos. The Court has already heard that testimony and how long that would take. We have

burden of proving these defendants guilty beyond a reasonable doubt.

THE COURT: Motion for a trial order of dismissal of the indictment at the end of the entire case upon the ground that the trial evidence is not legally sufficient to establish the offenses charged or any lesser included offenses thereof, is denied, and the Court believes that there is sufficient evidence in this case to warrant submission to the jury.

MR. BLITZ: Exception, your Honor.

At this time, I again renew my motion for a mistrial, your Honor, and a severence and/or a severence your Honor, based upon the arguments I've given before and ask the Court ro rule on that at this time.

THE COURT: That motion is denied for the reasons set forth in the Court's ruling on a prior similar motion made yesterday or the day before.

MR. BLITZ: The other way, your Honor said it was conditionally denied.

THE COURT: Yes.

MR. BLITZ: Is it still conditionally denied?

THE COURT: No, it's denied for all purposes. Unconditionally.

MR. BLITZ: Exc pt, your Honor.

[illegible], your Honor.

[illegible] stipulating?

MR. KATZ: I am stipulating.

THE COURT: With that objection noted, anything else?

MR. ROSENBLATT: Excuse me, your Honor, if I recall, maybe Mr. Katz-- I believe both counsel stipulated during the last trial.

THE COURT: Is there any question? Do you object to the tape going into evidence, is that correct?

MR. BLITZ: Yes, Judge.

THE COURT: Do you object to the redactions?

MR. BLITZ: To the redactions, no.

THE COURT: All right. Let's proceed now.

Did you offer this for evidence?

MR. ROSENBLATT: Yes, I offer it for evidence as People's exhibit [illegible] a technician in Court, your Honor. He can set